

LLOYD L. CLARK

IBLA 72-420

Decided September 17, 1974

Appeal from the decision of the District Manager, Coos Bay District, demanding \$ 2,307.95 as balance due on cruise timber sale.

Affirmed as modified.

1. Timber Sales and Disposals--Words and Phrases

"Cruise sale contract." Form 5430-3 (1966), "Contract for the Sale of Timber, Cruise Sale," is a lump sum contract for a designated lot of timber in a described area, and the contract price does not vary with the quantity or quality of timber actually located therein.

2. Timber Sales and Disposals

In legal effect, a vendor's estimate of quantity or quality of a specific lot of in-place dead or down timber is sui generis because certainty cannot be determined except by harvesting and, even then, there is room for disagreement as to whether all merchantable timber was harvested by vendee.

3. Timber Sales and Disposals

Where there has been a specific disclaimer of warranty by vendor-Government as to quality and quantity of specified dead trees in a timber cruise sale contract, the parties are deemed to have contracted on the assumption there was a doubt as to such quality and quantity and the risk with regard to such factors must be considered to have been assumed by vendee as one of the elements of the bargain.

4. Timber Sales and Disposals

Where warranty as to quality and quantity is specifically disclaimed by the Government-vendor in a timber cruise sale contract, only good faith is required of the Government in naming an estimated amount.

5. Timber Sales and Disposals

Where warranty as to quality and quantity is specifically disclaimed by the Government in a lump sum cruise timber sale contract, the vendee is not justified in relying on the Government's estimate of quantity or quality for the parties did not intend the estimate to be a basic assumption of the ultimate agreement.

6. Timber Sales and Disposals--Trespass: Generally

Where a Government estimate in a sale of timber by lot is grossly excessive as to quantity of board feet sold, and cutting of additional timber is autho-

rized in error by a Government timber manager, the Department position as to damages for trespass should be reexamined to determine whether payment for the additional trees, at the value when cut, may be obtained as a compromise under 4 CFR 103.5 and BLM Manual 5481.12 B and 9230.61.

7. Timber Sales and Disposals

The Government's resale expense should be deducted from the credit granted the vendee of a timber sale contract for timber remaining in place after abatement of the contract.

APPEARANCES: Fred P. Eason, Esq., Coos Bay, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Lloyd L. Clark filed notice of appeal from the decision of the District Manager, Coos Bay District Office, Bureau of Land Management, Oregon, dated March 9, 1972, making demand for \$ 2,370.95 owing on timber sale contract No. 36120-TS70-77. The alleged debt arose as the result of a sale on May 22, 1970, of dead trees and parts of trees. The Government prospectus said that there were approx-

imately 44 Port Orford cedar trees with an estimated 49 MBF (thousand board feet) of merchantable lumber. The Government estimated the total value to be \$ 2,082.50 or \$ 42.50 per MBF. Appellant submitted a bid of \$ 5,390 or \$ 110 per MBF, more than double the Government's estimate of value. It should be noted, however, that the second high was for \$ 105 per MBF, also more than double the Government's estimate.

Under the terms of the sale contract, appellant was given five months to remove the timber. Payments were to be made in \$ 600 increments dependent upon the rate of removal. Additionally, appellant posted a performance bond in the amount of \$ 1,100.

Appellant proceeded to remove substantial portions of the timber. He made total payments of \$ 1,800. On August 10, 1970, the District Manager wrote the appellant requesting submission within two days of \$ 2,400, i.e., four payments. It was noted that, though appellant had removed his equipment, "a number of logs and down trees, which appear merchantable, still remain on contract area along with all the arrowwood." By letter of August 14, appellant replied that he had logged and delivered 16,510 board feet at \$ 173 per thousand. He admitted that roughly 6 MBF of arrowwood remained but said there was no market for it. He further stated that "Mr. Casey [the BLM Curry Timber Manager] came back and marked a few more trees which came to 3,540 bd. ft." He noted that there was an overall shortage

of 22,950 board feet, and he concluded his letter by requesting some adjustment to reflect the real situation.

On August 20 the timber contract was suspended. On December 28 the District Office notified the appellant that his contract had expired on December 2 and that the District Office would determine the credit for timber remaining on the contract area to determine his remaining liability. On January 5, 1971, the cash bond of \$ 1,100 was transferred to the timber sale contract. The reappraisal found a total of 7,706 board feet remaining on the land with a current market value of \$ 276 from which \$ 26.15 was deducted as the cost to the Government of the appraisal. Regarding the 3,540 board feet marked by the Timber Manager, the District Manager in his decision of January 27, 1972, noted that various provisions of the timber sale contract made clear that the Timber Manager was without authority to authorize the cutting of additional trees. Accordingly, the Manager assessed double damages of \$ 130.80 for those trees. The District Manager stated that the total debt owing to the United States was therefore \$ 2,370.95. From this decision appellant has taken an appeal.

Appellant's basic contention is that because of the alleged error as to estimated quantity, there was no meeting of the minds and thus no binding contract was entered into.

[1] Appellant has not alleged that less than the specified 44 Port Orford cedar trees were made available to him. In this sense there was a meeting of the minds and no misunderstanding between the parties. Was the quantity of merchantable lumber to be cut in the future -- under the direction and control of appellant -- a basic assumption of the contract, or was it contemplated that appellant would assume the risk? The agreement herein was entered on Form 5430-3 (1966), "Contract for the Sale of Timber, Cruise Sale," which is a lump sum contract for a designated lot of timber in a described area. John D. Huffman, 7 IBLA 190, 79 I.D. 567 (1972). Sale of timber by tree cruise is the general practice of the Department. 43 CFR 5402.1(b) (1970), now section 5422.1 (1973). In a cruise sale, the contract price does not vary with the quantity or quality of board feet actually located in the area designated. Departmental regulations 43 CFR 5441.2(d) (1970), now section 5461.3 (1973), provided in part:

* * * For a cruise sale the purchaser shall not be entitled to a refund even though the amount of timber cut, removed, or designated for cutting may be less than the estimated total volume shown in the contract. * * *

Though the contract referred to an estimate of 49 MBF of merchantable timber, 1/ the contract also specifically provided:

1/ The Board recognizes that among the reasons for preparing estimates of quantity are (a) to provide limited assistance to lumbermen in determining whether or not to consider making an independent evaluation and possible bid; (b) to make the appraisal required by 43 CFR 5420.0-6; and (c) to program required installment payments.

Sec. 3. Installment Payments. (a) This is a lump sum contract which may be paid in installments as set forth in this section. The following estimates are made solely as an administrative aid in determining when installments become due. * * *

Except as provided in § 2, the Purchaser shall be liable for the total purchase price, even though the quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown above. (Emphasis added.)

Sec. 7. Passage of Title, Risk of Loss, and Disclaimer of Warranty.

* * * * *

(b) * * * Any warranty as to the quantity or quality of the timber sold hereunder is expressly disclaimed by the Government.

[2] In legal effect, a vendor's estimate of quantity or quality of a specific lot of in-place dead or down timber is sui generis. Certainty as to quantity and quality cannot be determined except by harvesting, and even then, there is room for disagreement as to whether the amount selected, cut and felled by vendee included all merchantable timber. Raddue v. Le Sage, 138 Cal. App. 2d 852, 292 P.2d 522 (1956). Given an original inaccuracy of the Timber Manager's estimate, and his statement that appellant "high graded" the tract through selective cutting of only the better timber, the Board is not convinced that the record firmly establishes the deficiency to be in the amount alleged by appellant.

[3] There are numerous cases in which such a lump sum contract, including an express disclaimer of quantity, has been held to preclude recovery for inaccuracies in volume estimates. See, e.g., John D. Huffman, *supra*, which involved an asserted 30 percent variation between the cruise estimate and the board feet actually recovered. See also Bureau of Land Management Manual 5436, wherein the lump sum contract and the disclaimer of warranty are discussed. 2/ Does appellant's contract permit a different result due to the size of the claimed overestimation? In Raddue, *supra*, the Court construed a private lump sum timber contract somewhat similar to that herein concerned. The deficiency therein was substantially greater than that claimed by appellant. Upon an estimation of 3,500 MBF of merchantable timber, the deficiency was in excess of 2,500 MBF. The Court stated at 292 P.2d 525:

2/ In BLM Manual 5436, Appendix 1, it is stated at page 78:

"Section 3(a) establishes that a contract executed on Form 5430-3 is a "lump sum" contract. A "lump sum" contract contemplates payment of a fixed amount regardless of the quantity of timber involved. This contrasts to a contract on a "scale" or "unit" basis where the total payment is dependent upon a measure of the quantity of timber actually removed. (See Form 5430-4, Contract For the Sale of Timber - Scale Sale for an example of a "unit" contract)."

The Manual further provides, at page 92:

"In Section 7(b) the Government disclaims any warranty of the fitness of the timber for any purpose of the purchaser. What does it mean? It means that the Government does not guarantee to the purchaser the quantity or quality of the timber sold. Frequently, our timber sales advertising includes a breakdown of expected log grade recovery. The purpose of the "disclaimer of warranty" is to expressly deny any representation of implied warranty which may elicit from such advertising. In a nutshell, the "disclaimer of warranty" precludes the purchaser from making a claim against the Government in the event quantity, quality or fitness of the timber are not up to the purchaser's expectations.

[T]he basic assumption of the quantity was necessarily an approximation and the parties themselves in their pleadings so recognized. Williston on Contracts, Rev. Ed., under the topic "Mistake", in section 1543, says:

* * * * *

"In the first place there must be excluded from consideration mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk. With respect to any matter not made a basic assumption of the contract the parties take their chances."

Restatement of Contracts, section 502, states:

"* * * [W]here parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable, * * *"

Under Comment a the following appears:

"Where both parties assume the existence of a certain state of facts as the basis on which they enter into a transaction, the transaction can be avoided by a party who is harmed, if the assumption is erroneous."

Under Comment f the following appears:

"Where the parties know that there is doubt in regard to a certain matter and contract on that assumption, the contract is not rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain."

The present case is brought within the foregoing rules by the presence in the contract of a provision which demonstrated that the parties considered that their assumption as to the quantity of merchantable timber upon the land might be erroneous.

See also 3 Corbin, Contracts § 598 at 585-86 (2nd ed. 1960).

Both the contract under consideration (wherein the Government disclaims warranty as to quality and quantity) and the Raddue contract (which provides for the consideration to be reduced pro rata if cutting operations fail to yield the estimated amount) recognize that quantity and quality are uncertain. The parties are deemed to have contracted on the assumption that there was a doubt with regard to such matters. In the Clark appeal, because of the Government disclaimer, the risk as to the quantity of merchantable lumber to be derived from the dead trees would ordinarily be considered to have been assumed by appellant as one of the elements of the bargain.

[4] In Raddue the faulty estimate was made by a third party. Everett Plywood and Door Corporation v. United States, 419 F.2d 425, 430 (Ct. Cl. 1969), indicates that the rule is no different where the estimate is made by the seller. In Everett, the Court distinguished the contract there under consideration from "the new contract form * * * which clearly negated any warranty of quantity." (Emphasis added.) It is difficult to conceive how the Government disclaimer of warranty could be made more clear than in Bureau of Land Management contract Form 5430-3 (1966) concerned herein.

The Court held that the Everett contract was not a sale by specific lot. Again distinguishing, the Court at 432 quoted

Brawley v. United States, 96 U.S. 168, 171-172 (1877), as to the seller's obligation in a specific lot sale:

Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific lot, and the naming of the quantity is regarded not as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases, the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity. (Emphasis added.)

The contract herein is a sale of a specific lot. Appellant alleges no bad faith; Brawley, supra, bars relief.

[5] Just as there has been no allegation of bad faith, neither has there been a showing of reliance. The facts herein are analogous to those in Brock v. United States, 84 Ct. Cl. 453 (1937), as discussed in Everett, supra, at 433:

The Brock case is clearly distinguishable from the [Everett] case, as the facts therein show that such plaintiff was plainly not justified in relying upon defendant's estimates as to timber volumes involved, nor does it appear that the parties intended or expected that the estimated quantities would be the basis of the agreement between them, and thus a warranty was not made by defendant in the contract. * *

* (Emphasis added.)

The sale herein encompassed a relatively small amount of readily accessible timber.

Appellant has not alleged that he

relied and did not examine the trees. ^{3/} Appellant's counsel, in his November 16, 1970, letter to the District Manager, alleged that there "may" have been no meeting of the minds with regard to quantity. In the notice of appeal he alleged that "there obviously was no meeting of the minds with regard to the quantity of timber being sold." No affidavit or other proof was offered, nor is there any clear allegation that appellant in fact relied on the Timber Manager's estimate as to the condition and quantity of merchantable lumber in the dead trees.

The fact that appellant has not alleged reliance is an indication of the understanding between the parties as to their bargain. Even assuming, arguendo, that the deficiency does approach 51 percent, this is not controlling. If the Government estimate had been 51 percent less than the actual amount of merchantable timber which was later cut, it is doubtful that under the terms of the contract a court would permit the Government to recover an augmented purchase price from appellant -- absent a showing of fraud.

Even if appellant had relied on the estimate, the Board finds that appellant was not justified in so relying for the parties never intended the estimate to be an assumed basis of the ultimate agreement or to control the total amount due on the contract.

^{3/} Cf. Uniform Commercial Code, § 2-316(b), under which there is no implied warranty for defects which an examination ought to have revealed. As to a sale of standing lumber to be cut by purchaser, see § 2-107.

Rather, the parties recognized from the beginning that the quantity of merchantable timber -- to be cut in the future under the direction and control of appellant -- was not a basic assumption of the contract.

[6] As to the additional timber apparently authorized for cutting by the Timber Manager, that timber may not be given away. Under the circumstances, however, and despite sections 8 and 13 of the contract, we feel that double damages for trespass would be unduly harsh. It is therefore suggested that the Department position be re-examined to determine whether payment for the additional timber, at its realistic value when cut, would be appropriate as a compromise. 4 CFR 103.1 and 103.5; 4/ BLM Manual 5481.12 B and 9230.61.

4/ 4 CFR 103.1 reads in part:

"Scope and Application.

"The standards set forth in this part apply to the compromise of claims, pursuant to section 3(b) of the Federal Claims Collection Act of 1966, 80 Stat. 309, which do not exceed \$ 20,000 exclusive of interest. The head of an agency or his designee may exercise such compromise authority with respect to claims for money or property arising out of the activities of his agency prior to the referral of such claims to the General Accounting Office or to the Department of Justice for litigation. * * *

4 CFR 103.5 provides:

Enforcement Policy.

"Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon. Mere accidental or technical violations may be dealt with less severely than willful and substantial violations."

[7] The Government's resale expense should be deducted, under established procedures, from the credit granted to appellant for that merchantable timber which remained on the site after his departure. Leslie G. Caughman, A-30890 (February 21, 1968).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Joseph W. Goss
Administrative Judge

I concur:

Edward W. Stuebing
Administrative Judge

Douglas E. Henriques, dissenting

The instant case presents issues of some difficulty and I sympathize with the majority's attempt to resolve them. Nevertheless, I cannot assent to a decision which, through reliance on the literal terms of a lump sum sales contract, ignores and distorts the real purposes behind the utilization of this contract device.

I have no quarrel with the proposition that in a normal situation a lump-sum contract which contains an express disclaimer of warranty as to quantity precludes recovery for inaccuracies in volume estimates. See e.g., John D. Huffman, 7 IBLA 190, 79 I.D. 567 (1972); Irving Pearce, 5 IBLA 373 (1972); Forest Management, Inc., A-31045 (February 6, 1970). The rationale for the rules prohibiting recovery for normal underruns is premised on two separate factors. First, the nature of a timber cruise is such that a truly accurate estimate is virtually impossible. Small errors are intrinsic to the process. Secondly, while many purchasers would be quick to complain of an underrun, few would complain of an excess of timber over the estimate relied upon. Thus, the nature of a lump-sum contract is to apportion between seller and buyer the risks inherent in such a sale.

As I see it, this case presents the question of whether or not an underrun of nearly 51 percent is so great as to support a finding

that there was no meeting of the minds between the two parties. ^{1/} I think this is a question deserving of rigorous consideration. I think that it is more than unfortunate that this question is not examined in the majority's analysis, an analysis which I feel places inordinate reliance on specific contract terms to the derogation of simple common sense.

As the majority apparently sees it, the Government's volume estimate is no more than a dart throw by a blind man. Appellant had absolutely no right to rely thereon. I doubt that the foresters who made the timber cruise took so critical a view of their official capabilities. And I cannot but wonder why government monies are expended on the making of timber cruises if the results are so unreliable as to be worthy of no reliance.

The short answer to the majority's position is that both parties rely on the estimate. The Government, in its prospectus concerning the timber sale, put a total appraised price of \$ 2,082.50 on the timber to be sold. This price was arrived at by multiplying the

^{1/} The majority states that "[g]iven an original inaccuracy of the Timber Manager's estimate, and his statement that appellant "high graded" the tract through selective cutting of only the better timber, the Board is not convinced that the record firmly establishes the deficiency to be in the amount alleged by appellant." (Emphasis added.) The Government has not even alleged that the shortage is less than appellant's contentions. The fact that appellant has "high graded" the tract, however relevant it may be to a question of quality, has no bearing on the issue of the quantity of the timber involved. Finally, if there is a factual uncertainty the case should be remanded for a hearing. See 43 CFR 4.415.

appraised price per Mbf (\$ 42.50) by the estimated Mbf involved in the sale (49). The prospectus specifically stated that "[n]o sale shall be made for less than the total appraised price." Thus, any bid which did not match the total appraised price, which in turn was dependent on the estimated volume of timber, would be rejected. Certainly this is a form of reliance on the volume estimates. Further, under the category of "High Bid" of Form 5430-7 (January 1969) "Timber Sale Bid Record," a bid of \$ 110 was recorded for appellant and a bid of \$ 105 was recorded for one Tom Flood. The total amount bid was reached by multiplying the volume estimate by the amount bid.

Finally, the timber sale contract, Form 5430-3 (July 1966), makes specific reference to both the estimated volume (49 Mbf) and the price per unit (\$ 110). As a practical matter it is thus clear that reliance is placed by both parties on the estimates of volume made by Governmental employees fulfilling their official duties.

I have stated above that a lump-sum contract containing an express disclaimer of warranty as to quantity operates to preclude recovery for deficiencies in volume estimates in the normal situation. Such a result accords with the policy considerations implicit in the utilization of the lump-sum contract to which I have already alluded. The real question which this case presents, as I have noted above, is

whether the deficiency evidenced in the instant case is so great as to be beyond the general rule and necessitate reformative action by the Department. 2/ The approach taken by the majority would sanction underruns of 90 percent, for if you have no right to rely on an estimate it is irrelevant how erroneous the estimate in actual fact is. Certainly a point must be reached where some reliance on the Government's statements is justifiable.

It may be true, that, in the words of Mr. Justice Holmes, those who deal with the Government must turn square corners, 3/ but certainly the Government should be held to no less an exacting standard when dealing with its citizens. To blandly say that appellant has made his bargain and should be forced to live with it is to place the Government in the position of a private party who through slick means has achieved an advantage and intends to maintain it. The Government has a duty to both the public at large and the individual members of the public who deal with it. It should not attempt to benefit the former at the expense of the latter, as if by so doing some greater good is thereby achieved. Rather its obligation is to deal fairly with all its citizens and at the same

2/ The majority places heavy reliance on Raddue v. Le Sage, 138 Cal. App. 2d 852, 292, P.2d 522 (1956). It points out that in Raddue the underrun was far greater than the present case. The relevancy of this observation to the issue before this Board is unclear since in Raddue the contract provided for a pro-rata reduction for any underrun of timber. It is the absence of any pro-rata reduction that has generated this appeal.

3/ Rock Island, Arkansas & Louisiana R.R. Co. v. United States, 254 U.S. 141, 143 (1920).

time protect the general public's interest. The general interest in the instant case is to achieve fair market value for Government owned timber. I do not see how this interest is advanced by forcing the appellant to pay for timber that does not now exist and did not exist when the sale was conducted or the contract executed.

The premise of the appellant's bid was that there were approximately 49 Mbf of merchantable timber to be sold. The risk he assumed was that the Government estimate might be moderately deficient. He did not assume the risk that the Government's estimate would be erroneous by more than 50 percent. Whether he did or did not examine the area himself does not make the results of the Government's cruise more realistic.

I note that the majority opinion states that there has been no showing of reliance. Indeed it actually declares that "[t]he fact that appellant has not alleged reliance is an indication of the understanding between the parties as to their bargain." With all deference to the majority I find these statements not supported by the record as shown in the case files. If appellant is not alleging reliance, then on what possible ground is he appealing? Reliance on the Government's volume estimate is implicit in this appeal. That reliance is involved is palpably obvious. Why appellant should be required to clearly allege the obvious is not readily apparent.

I would grant partial reformation of the contract. Appellant bid \$ 110 per Mbf, and should be held to his bid valuation. It is reported that appellant removed 16,510 board feet; there remained, according to the Government post-sale cruise appraisal, 7,760 board feet. These make a total of 24,216 board feet available under the timber sale contract. At the rate agreed upon this totals out to \$ 2,663.76. This I believe is the amount for which the appellant should be liable based on the original sale. Added to this should be the cost of post-sale appraisal, \$ 26.15. I also feel that the trespass assessment was correct. Appellant clearly was on notice that the Timber Manager was not authorized to allow additional cuttings without additional payments. The majority's attempt to mitigate this element because it is "unduly harsh" is, I think, insupportable in the case law. See Ray Cole, A-29526 (October 21, 1963).

Accordingly, I respectfully dissent from the majority's opinion.

Douglas E. Henriques
Administrative Judge

